SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 666

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. a]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 141-9

UNITED STATES OF AMERICA, Appellee,

vs.

FRANK COSTELLO, Defendant-Appellant

Appendix to Appellant's Brief

On Appeal from the United States Court for the Southern District of New York

[fol. 1] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT UNDER RULE 15(b)

Defendant was indicted and tried for the evasion of Federal Income Taxes by the filing of false tax returns. After a trial before Hon. John F. X. McGohey and a jury, the defendant was found guilty on three of the four counts in the indictment. The defendant was sentenced on May 17th, 1954 to five years imprisonment and ordered to pay a fine of $10,000 on each count.

On April 5, 1955, United States Court of Appeals for the 2nd Circuit reversed the judgment on the second count. The Supreme Court granted certiorari on the limited question of an indictment based on hearsay evidence and subsequently affirmed the Court of Appeals.

A motion was made on May 21, 1956 by defendant pursuant to Section 2255, Title 28, United States Code and Rule 35 of Federal Rules of Criminal Procedure to correct defendant's sentence on the grounds that the sentence was in excess of the maximum term permitted. Said motion was denied by the Hon. John F. X. McGohey in an opinion dated August 21, 1956. This is an appeal from said decision denying defendant's application to vacate and correct the illegal sentence.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

FRANK COSTELLO, Defendant.

INDICTMENT

The Grand Jury charges:

1. On or about the 14th day of March, 1947, in the Southern District of New York, Frank Costello, the defendant, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New York, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $23,673.90 and that the amount of tax due and owing thereon was the sum of $8,338.72, whereas in truth and in fact, as he then and there well knew, his net income for the said calendar year was the sum of $31,630.54 upon which said net income he owed to the United States of American an income tax of $13,224.88. [Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

[fol. 3] Second Count

The Grand Jury further charges:

1. On or about the 9th day of March, 1948, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1947, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America, for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New

York, a false and fraudulent joint income tax return, on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $17,307.23 and that the amount of tax due and owing thereon was the sum of $5,085.94, whereas, in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $72,561.45 upon which said net income there was owing to the United States of America an income tax of $41,215.53.
[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Third Count

The Grand Jury further charges:

1. On or about the 14th day of January, 1949, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1948, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948 [fol. 4] by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $12,325.30, and that the amount of tax due and owing thereon was the sum of $2,153.48, whereas in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $47,619.92, upon which said net income there was owing to the United States of America an income tax of $15,965.22.
[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Fourth Count

The Grand Jury further charges:

1. On or about the 10th day of March, 1950, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1949 was married, did wil-

fully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $22,110.70, and that the amount of tax due and owing thereon was the sum of $4,910.94, whereas in truth and in fact, as he then and there well knew, their [fol. 5] joint net income for the said calendar year was the sum of $61,739.18, upon which said net income there was owing to the United States of America an income tax of $23,521.40.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Myles J. Lane, United States Attorney.

Foreman

In United States District Court, Southern District of New York

Notice of Motion to Vacate Sentence—May 15, 1956

Sir:

Please take notice that upon the annexed affidavit of Joseph Leary Delaney, duly sworn to on the 15th day of May 1956, the indictment and all the proceedings heretofore had herein, the defendant will move this Court, pursuant to Section 2255 of Title 28, United States Code, and Rule 35 of the Federal Rules of Criminal Procedure, at a stated term thereof for the hearing of motions in criminal causes, appointed to be held in Room 318 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 21st day of May 1956, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order vacating, setting aside [fol. 6] and correcting that part of the sentence which im-

posed five years imprisonment and a fine totalling $20,000 upon the grounds that such part of the sentence was imposed in violation of the Constitution and the laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of the maximum authorized by law; and for such other and further relief as to the Court seems just and proper.

Dated: New York, New York,

May 15, 1956.

Yours, etc., Hays, St. John, Abramson & Heilbron, 120 Broadway, New York 5, New York, Delaney & Donoghue, 580 Fifth Avenue, New York 36, New York.

To: Hon. Paul W. Williams, United States Attorney, Southern District of New York.

[fol. 7] In United States District Court, Southern District of New York

Affidavit of Joseph Leary Delaney in Support of Motion

State of New York,
County of New York, ss.:

Joseph Leary Delaney, being duly sworn, deposes and says:

I am one of the attorneys for the above-named defendant, Frank Costello, and submit this affidavit in support of his motion for an order vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fi · totalling $20,000.

After a trial before Hon. John F. X. McGohey, United States District Judge, and a jury, the defendant was found not guilty on the first count, and guilty on the second, third and fourth counts of an indictment charging him with willfully attempting to evade and defeat federal income taxes

for the calendar years 1946, 1947, 1948 and 1949, by filing false and fraudulent income tax returns for such years. On May 17, 1954, the defendant was sentenced to five years imprisonment on each count to run concurrently and to pay a fine of $10,000 on each count.

Subsequently, on April 5, 1955, the United States Court of Appeals for the Second Circuit reversed the judgment of conviction on the second count and affirmed the judgment of conviction on the third and fourth counts (221 F. 2d 668, 679). The effect of such was to reduce the alleged tax deficiency to $28,532.46. The Supreme Court on Oc- [fol. 8] tober 10, 1955, granted certiorari limited, however, to the single question whether an indictment and conviction can be sustained where only hearsay evidence had been presented to the Grand Jury (350 U.S. 819). On March 5, 1956, the Supreme Court affirmed (350 U. S. 359, 100 L. Ed. 317).

Said two counts in substance alleged that the defendant wilfully attempted to defeat and evade income taxes due for the calendar years 1948 and 1949 by filing with the Collector of Internal Revenue false and fraudulent income tax returns.

The indictment was brought under the provisions of the Internal Revenue Code of 1939. Section 145(b) of the Internal Revenue Code of 1939 provided in part:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, Section 3616(a) provided in part that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Said Section 3616(a) has been amended under the Internal Revenue Act of 1954 by omitting the phrase "with intent to defeat or evade" from the present Section, which is now numbered 7207.

[fol. 9] On April 30, 1956, the Supreme Court delivered its opinion in *Berra* v. *United States* (U. S.), a case involving the construction of Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939. The Court had granted certiorari limited to the question of whether it was error for the Trial Judge to refuse to give a requested instruction that the jury might return a verdict of guilty of the "lesser crime" under Section 3616(a) even though the indictment was specifically brought under Section 145(b). The Court affirmed, pointing out:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction."

In the majority opinion, Mr. Justice Harlan stated:

> "* * * here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616(a)). In this instance Sections 145(b) and 3616(a) covered precisely the same ground."

And Mr. Justice Harlan specifically noted:

> "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under § 145(b) were made before, during or after trial."

Stating that the Supreme Court itself should "reverse this case or at least remand for resentencing under the mis-[fol. 10] demeanor statute, § 3616(a)," Mr. Justice Black, in a dissenting opinion in which Mr. Justice Douglas joined, pointed out that:

> "Although § 3616(a) unambiguously makes the conduct charged a misdemeanor punishable by no more

than one year in prison, the trial judge apparently felt that he was compelled to treat the offense as a felony because of the statement in the indictment that the conduct charged was in violation of Section 145(b)."

And added the following footnote:

"But see Williams v. United States, 168 U. S. 382, 389; United States v. Hutcheson, 312 U. S. 219, 229; Fed. Rules Crim. Proc., 7(c), which provides in part that: 'The indictment * * * shall state for each count the official or customary citation of the statute * * * which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment * * * or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.' Cf. Cole v. Arkansas, 333 U. S. 196."

Referring to the majority opinion, Mr. Justice Black, in a footnote, stated:

"Apparently the Court means by this to leave open to petitioner the opportunity to challenge his sentence by a motion to correct it under 23 U. S. C. § 2255. Of course I agree that a motion under that section would be appropriate, but I think petitioner is entitled to have it settled now."

[fol. 11] Mr. Justice Black further stated:

"The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over

the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Mr. Justice Black then pointed out a basic principle of American law:

"A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attor- [fol. 12] ney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v. Hopkins, 118 U. S. 356, 370.

"* * * A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here."

The Government itself, in its brief in the *Berra* case, admits that "Section 3616(a) has frequently been utilized

by the Government in the prosecution of income tax cases" (page 23 of Brief filed in the Supreme Court).

The defendant here asserts that where Congress has made the specific offense of delivering or filing a false and fraudulent income tax return, with intent to defeat or evade the assessment, a misdemeanor punishable by a $1,000 fine or imprisonment not exceeding one year, or both, neither the Court nor the prosecutor may resort to the general language of a felony statute in order to increase the punishment where the indictment alleges that the defendant filed a false and fraudulent income tax return with intent to evade and defeat taxes or assessments. Thus any sen-
[fol. 13] tence of more than a $1,000 fine or imprisonment for more than one year is in violation of his constitutional rights, especially those rights granted him under the Fifth, Sixth and Eighth Amendments.

On May 14, 1956, the defendant commenced serving the five-year sentence imposed against him and he is now a prisoner confined in the United States Detention Headquarters in New York City.

The defendant now moves this Court to vacate, set aside and correct that part of the sentence which imposed five years imprisonment and a fine totalling $20,000 upon the grounds that such part of the sentence was imposed in violation of the Constitution and laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of he maximum authorized by law.

No motion for similar relief has been made by the defendant.

(S.) Joseph Leary Delaney.

(Sworn to May 15, 1956.)

[fol. 14] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF WHITNEY NORTH SEYMOUR, JR., IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

WHITNEY NORTH SEYMOUR, JR., being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York and am familiar with the prosecution of this case. I make this affidavit in opposition to defendant's motion to vacate his sentence on the ground that he should have been sentenced for a misdemeanor rather than a felony.

The essence of defendant's motion is that his conviction was for an offense embraced by Section 3616a of the Revenue Code of 1939, since the indictment here refers to the filing of a "false and fraudulent joint income tax return" as the manner used in attempting to defeat and evade his taxes. This contention gives too much significance to formal matters of pleading. Although it principally raises questions of law to be dealt with in a memorandum, there are certain facts which bear on the contention and should be set out here.

The filing of false returns is alleged in the indictment as a "manner" of attempted evasion under Section 145(B), Title 26, United States Code. This is not the only "man-[fol. 15] ner" which might have been alleged under that section. A whole catalog of alternatives is set forth in *Spies* v. *United States*, 317 U. S. 492, at 499 (1943). Many of these other manners of evasion could just as easily have been alleged here.

The proof at the trial of this case showed that the defendant had, among others, used the following devices in his attempted evasion of income taxes:

1. A bookkeeping system in his slot machine business that eliminated basic collection slips and recorded income on recapitulation sheets with no indication of names of

individual collectors or other means of cross-checking receipts.

2. Receipt of distributions from the slot machine business in cash.

3. Operation of the gambling casino at Beverly Country Club with only pencilled daily total sheets, entered into the permanent corporate books once a year, all without supporting memoranda.

4. Failure to keep any records of other gambling income, which was reported in part in round figures on his tax returns as "miscellaneous".

5. Concealment of true ownership of assets: Sands Point home in name of Mrs. Costello paid for in $18,000 cash by the defendant; 79 Wall Street in name of Mrs. Costello paid for in $52,500 cash by defendant; Consolidated Television stock in George Wolf's name paid for in $22,000 cash by the defendant; lots in Hollywood, Florida, in name of Geigermans paid for in $20,000 cash apparently by the defendant.

6. Studious avoidance of checks in everyday transactions, except to prove charitable contributions.

7. Only checks deposited in defendant's bank account. No cash.

8. All principal dealings on a strictly cash basis.

[fol. 16] These tax evasion devices could just as easily have been alleged in the indictment as the manner of evasion instead of alleging the filing of false returns. The reason they were not is simple.

As a matter of uniform practice, the United States Attorneys' Offices have been directed by the Department of Justice to try to follow set forms in drawing tax evasion indictments. Annexed hereto as Exhibits A and B is the basic 145(B) form forwarded to our office in 1948 and amended in 1954. The allegation concerning the filing of a false return as a simple, straightforward "manner" of evasion characteristic of most tax cases which permits uniform pleading. Other forms exist for special cases, but this form is the basic one.

The indictment in this case obviously followed the standard form. The only significance of the false return allegation is that it alleges one of the manners of evasion, and in doing so follows a practice of uniform pleading. It is

too much to say that its effect is also to reduce a felony to a misdemeanor, when any other allegation as to the manner of evasion would not have done so.

This is the first time defendant has raised his present attack on the manner of pleading in the indictment. Trial was completed two years ago. The case has since been up to the Supreme Court and back. Had defendant made his motion before trial it would have been possible to cure any defect by seeking a superseding indictment. His application now is too late. By not making his motion before trial he waived the right to do so at all.

Wherefore, your deponent respectfully prays that defendant's motion to vacate be denied.

Whitney North Seymour, Jr., Assistant United States Atorney.

(Sworn to May 21, 1956.)

[fol. 17] EXHIBIT A, ANNEXED TO AFFIDAVIT OF WHITNEY NORTH SEYMOUR, JR.

In the District Court of the United States for the —— District of ——

No. ——

The grand jury charges:

That on or about the —— day of ——, 19—, in the —— District of ——, ——, late of ——, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 19—, by filing and causing to be filed with the Collector of Internal Revenue for the —— Internal Revenue Collection District of ——, at ——, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $—— and that the amount of tax due and owing thereon was the sum of $——, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $——,

upon which said net income he owed to the United States of America an income tax of $——.
[fol. 18] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

—— ——, Foreman.

—— ——
United States Attorney.

[Individual—Attempt to defeat and evade]

Exhibit B, Annexed to Affidavit of Whitney North Seymour, Jr.

In the District Court of the United States for the —— District of ——

No. ——

(2, United States Code

Section 145(b))

United States of America

against

The grand jury charges:

That on or about the —— day of ——, 19—, in the —— District of ——, late of ——, did wilfully and knowingly [fol. 19] attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year [1] 19—, by filing and causing to be filed with the (Collector) (Director) of Internal Revenue for the —— Internal Revenue Collection District of ——, at ——, a false and fraudulent income tax-return wherein he stated that his net income [2] for said calendar year [1] was the sum of $—— and that the amount of tax due

---

[1] If fiscal year is involved substitute for "calendar year", "fiscal year ended ——"

and owing thereon was the sum of $——, whereas, as he then and there well knew his net income [2] for the said calendar year [1] was the sum of $——, upon which said net income he owed to the United States of America an income tax of $——.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

A True Bill.

—— ——, Foreman.

—— ——

United States Attorney.

[Individual—Attempt to defeat and evade]

Form No. 7

[fol. 20] In United States District Court, Southern District of New York

Opinion of McGohey, D. J.—August 21, 1956

McGohey, *D. J.*

The defendant has timely moved pursuant to Section 2255 of Title 28 U. S. C. A. and Rule 35 of the Federal Rules of Criminal Procedure for an order "vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totaling $20,000."

The defendant was tried on an indictment containing four counts which respectively charged that in each of the years 1946 through 1949 he wilfully attempted to evade payment of income taxes due the United States by "filing a false and fraudulent income tax return" in violation of Sec. 145(b) of the Internal Revenue Code of 1939. The jury, on May 13, 1954, returned verdicts of not guilty on the first count, and guilty on the second, third and fourth counts. The defendant was sentenced on each of the latter counts to a term of five years and a fine of $10,000, plus costs of pros-

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[2] If adjusted gross income does not exceed $5000, and tax table is used substitute for "net income", "adjusted gross income".

ecution, the prison terms to run concurrently. The Court of Appeals reversed as to the second count and affirmed as to the third and fourth counts.[1] The Supreme Court, reviewing only the legal sufficiency of the evidence before the Grand Jury, affirmed.[2]

[fol. 21] This motion presents the question, not heretofore raised by the defendant, whether, in view of Sec. 3616(a) of the Internal Revenue Code of 1939, the Court could legally impose five-year terms and $10,000 fines.

Section 145(b) provides:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616(a) provides that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The defendant does not contend that the latter section repealed the former. His contention is that since both sections cover precisely the same ground, "the specific offense of filing a false return with intent to evade taxes, under Sec. 3616(a) prevails over the general denunciation of attempting to evade taxes denounced by Sec. 145(b)" and therefore a sentence greater than one year and $1,000 fine on each count is illegal.

[fol. 22] The motion is denied on the authority of United

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[1] 221 F. 2d 668.

[2] 350 U. S. 359.

States v. Moran [3] in which the Court of Appeals for this Circuit rejected a similar contention.

Settle order.

Dated: New York, N. Y., August 21, 1956.

John F. X. McGohey, *U. S. D. J.*

[fol. 23] In United States Court of Appeals for the Second Circuit, October Term, 1956

No. 183

(Submitted December 10, 1956)

Docket No. 24333

United States of America, Appellee,

v.

Frank Costello, Defendant-Appellant

Opinion—December 12, 1956

Before Swan, Medina and Waterman, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

Hays, St. John, Abramson, Heilbron, Delaney & Donoghue, *Attorneys for Appellant*; Osmond K. Fraenkel, Morris Shilensky, Joseph Leary Delaney and Jacob Kossman, of Counsel.

Paul W. Williams, United States Attorney, *for Appellee;* Arthur H. Christy, Robert Kirtland and William K. Zinke, Assistant United States Attorneys, of Counsel.

[fol. 24] Per Curiam:

Appeal from denial of a motion to correct a sentence imposed under 26 U. S. C. A. § 145(b). On the authority of *United States* v. *Moran*, 2 Cir., 236 F. 2d 361, certiorari denied November 13, 1956, the order is affirmed.

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[3] 2 C.—F. 2d—; decided Aug. 15, 1956.

[fol. 25] In United States Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee

v.

Frank Costello, Defendant-Appellant

Judgment—December 12, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 26] [File endorsement omitted.]

[fol. 27] SUPREME COURT OF THE UNITED STATES,

October Term, 1956

No. 666

FRANK COSTELLO, Petitioner

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed January 28, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 27a] Clerk's Certificate to foregoing transcript omitted in printing.

24/24

Office - Supreme Court, U.S.
FILED
DEC 2 3 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term 1956

No. 666

FRANK COSTELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,
Attorneys for Petitioner.

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Supreme Court of the United States

October Term 1956

No.

FRANK COSTELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal by the United States District Court for the Southern District of New York of petitioner's motion for a correction of his sentence after conviction for filing false income tax returns with intent to evade taxes.

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed as Appendix A (pp. 13-16, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on December 12, 1956 and is final.

2. No application was made for rehearing.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Question Presented for Review

1. May a person convicted of having wilfully attempted to evade income tax be sentenced under 26 U. S. C. 145(b) of the Revenue Code of 1939 rather than under 26 U. S. C. 3616(a) of that Code, where the indictment charged only the filing of a false and fraudulent return?

(d) Statutes Involved

Internal Revenue Code 1939

§ 145. Penalties—

* * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

§ 3616. Penalties.

Whenever any person—

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(e) Statement of the Case

Petitioner was indicted on four counts, each of which charged that he "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" (2a-4a).* The indictment made reference to 26 U. S. C. 145(b). The years covered were 1946 to 1949. The jury acquitted petitioner with regard to 1946; the Court of Appeals (221 F. 2d 668) set aside the conviction as to 1947. This Court (350 U. S. 359), limiting its review to the sufficiency of the evidence before the grand jury, affirmed the conviction.

Petitioner was sentenced to serve five years in prison on each count, the sentences to run concurrently, and was fined $10,000 on each count (7a, 20a). Thus, if the sentence was proper, petitioner must serve five years and pay $20,000.

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* Parenthetic references unless otherwise indicated are to the Appendix in the court below.

Immediately after petitioner commenced serving his sentence (13a) he moved in the District Court under 28 U. S. C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure for correction of his sentence on the ground that Section 3616(a) of the 1939 Code controlled the sentence for the offense with which he was charged and that it could not exceed imprisonment for one year and fine of $1,000 on each count (5a-13a).

The District Court denied the motion (22a) on the authority of *United States* v. *Moran*, 236 F. 2d 361. The Solicitor General opposed certiorari in that case on the ground that the question was not properly presented by the record and this Court denied certiorari on November 13, 1956, 352 U. S. 909. The Court of Appeals was then asked in the instant case to reconsider the question decided in *Moran*, but refused to do so (*infra*, p. 16).

(g) The Reasons Relied on for the Issuance of the Writ

The court below has decided an important question of federal criminal law which should be reviewed by this Court and has misconceived the purport of this Court's decision in *Berra* v. *United States*, 351 U. S. 131.

In *Berra* the question with regard to the sufficiency of the sentence was not raised and the issue, therefore, not resolved. The Court left it open for the issue to be raised—as it has been here—under 28 U. S. C. 2255. Justices Black and Douglas believed the issue should have been faced then and there (351 U. S. at 137).

The issue is important, having been raised in a large number of cases since the *Berra* decision.[1] In *Moran* the Solicitor General recognized that it should be set at rest by this Court, but believed that had not been the appropriate occasion, because the issue had not been raised in the District Court.[2] Here, of course, it has been so raised.

In *Berra* this Court, assuming that Section 3616(a) as well as Section 145(b) applied to income tax prosecutions,[3]

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[1] After this Court's decision in *Berra* a motion was made under 28 U. S. C. 2255 but the issue was avoided by the District Court's exercise of discretion in reducing the sentence to the misdemeanor level (Order, June 25, 1956, East. Dist. Missouri, Eastern Division, Cr. 27866(2)). In addition to *Moran*, 236 F. 2d 361, the same issue was decided in *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, application for certiorari pending under the name of *Ansell* v. *United States*, and *United States* v. *Achilli*, 234 F. 2d 797, cert. den. 352 U. S. 916, in all of which cases the issue was not originally presented by motion under Section 2255. In one case where such a motion was made the Court ruled that Section 3616(a) was not applicable to income taxes: *United States* v. *Nicastro*, 143 F. Supp. 756 (EDNY). See also *United States* v. *Cincotta*, not yet reported (NDNY, Crim. 31842).

[2] In the government's brief in opposition to certiorari in the *Moran* case the Solicitor General said:

> "These questions, arising from the overlap of the two Code provisions (see *Berra* v. *United States*, 351 U. S. 131), are being raised with increasing frequency in the lower courts. * * * Although it is desirable that the question be definitely resolved, the Court may consider that review by it should await the arrival of a petition and record properly presenting the issue."

[3] The legislative history of Section 3616(a) buttresses the fact that it applies to income tax returns. Section 3616(a) was first enacted as part of an Internal Revenue Act which contained an income tax. This was Chapter 173 of the 38th Congress, 1st Session, enacted 1864, 13 Stat. 223. Section 11 (13 Stat. 225) made it a duty on various persons "to make a list or return * * * of the amount of annual income * * *." Section 15 (*id.* 227—sometimes erroneously cited as 226) contains substantially the same language as 3616(a). Section 116 (*id.* 281) contains the provision relating to income tax. Section 118 (*id.* 282) provides that if an individual fails to file a return the assessor can assess. It imposes no other penalty. Sections 120-122 (*id.* 283, 285) impose specific taxes on certain corporations and provide a penalty of a fine for a failure to make a return but no penalty for a false return.

held (351 U. S. at 134) that the two sections "covered precisely the same ground" in that instance. And the relevant facts here are identical. The Court of Appeals in *Moran* limited this statement as applicable only to the issue of intent (236 F. 2d at 363, note 4). This, we submit, is not justified by anything said by this Court in *Berra*.

Petitioner makes two basic contentions: 1) that Section 3616(a) controls over Section 145(b) wherever, as here, the only charge in the indictment is the filing of a false return, on the familiar principle that in this respect Section 3616(a) is a specific statute, dealing only with the filing of false returns, whereas Section 145(b) is a general provision dealing with evasion of income taxes by any means; 2) even if it be held that either section might be applicable, then the section imposing lesser penalties must control as otherwise improper discretion would be vested in prosecutors which would conflict with the Constitution as an unlawful delegation or as denial of due process.

The Court of Appeals in *Moran* dealt only with the first of these issues although the second had been presented to it. While this omission was specifically called to that court's attention in the case at bar, it nevertheless adhered to its original reasons in *Moran*.

1. In *Moran* the court below apparently accepted the contention of both parties that a specific statute controls over a general one.[4] But it did not decide which of the two sections was the specific one. Instead it rested its entire decision on the statement that "each section requires an element of proof not required by the other" and considered the case "directly controlled" by *United States* v.

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[4] Citing *MacEvoy* v. *United States*, 322 U. S. 102, 107, 74 S. Ct. 890, 88 L. Ed. 1163; *Washington* v. *Miller*, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; *Kepner* v. *United States*, 195 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114; *United States* v. *Chase*, 135 U. S. 255, 260, 10 S. Ct. 756, 34 L. Ed. 117; *Robinson* v. *United States*, 8 Cir., 142 F. 2d 431.

Beacon Brass Co., 344 U. S. 43, citing also *United States* v. *Gilliland*, 312 U. S. 86, and *United States* v. *Lange*, 128 F. Supp. 797. In the case at bar the court below has not added anything to its earlier consideration of the problem.

We submit that the question which of the two sections is the specific one and therefore controlling should be decided by this Court. It cannot be avoided by reliance on the cases cited by the court below. In each of those cases the indictment required proof other than was required under the alternative provision of law which the defense in those cases argued was applicable. In the case at bar the proof required by the indictment was identical under both sections.

Thus, in the *Beacon Brass* case a false statement which could have supported a conviction under 18 U. S. C. 80 would not by itself support a conviction under the section on which the prosecution rested, namely, 26 U. S. C. 145(b), because the latter section, but not the former, required proof of a wilful intent to evade taxes. In the *Gilliland* case the indictment (see 35 F. Supp. 181 at 183) had not charged a violation of the Hot Oil regulations, but merely the making of a false statement in a matter of federal concern. This was sufficient under 18 U. S. C. 80, but would not have been sufficient under the so-called Hot Oil statute. In the *Lange* case the indictment under 18 U. S. C. 1001 did not charge that the false statement was made under oath, whereas under the perjury statute it would have been necessary not only to charge that, but also to charge that the oath was validly administered.

In the case at bar the indictment charged the filing of a false return for the purpose of evading taxes. This charge comes precisely within both statutes. While it was essential to allege that this was in connection with income taxes to bring the case within Section 145(b), no prosecution could have been had under Section 3616(a) without

alleging, in identical language, that the return was filed for the purpose of evading taxes, and certainly it would have been necessary to state what tax was involved. We have, therefore, complete identity of allegations.

Coming then to the basic problem, Section 3616(a) covers the specific method of tax evasion here charged, namely, the filing of a false and fraudulent income tax return; Section 145(b) covers all methods. True, Section 145(b) deals with a more limited category of taxes, but that, we submit, is not an appropriate criterion. There are various other sections which deal with particular kinds of taxes which also use the same words as does Section 145(b), those dealing with Estate and Gift Taxes and Admissions and Dues (Int. Rev. Code of 1939, §§ 894, 1024, 1718). If each of these is to be deemed the "specific" section applicable regardless of the method of evasion, then Section 3616(a) will have no important use. Moreover, as the government stated in its brief in this Court in *Berra*, Section 3616(a) has been and is still being used for income tax evasions. Since it is the only provision dealing with the specific method of evasion which was the only method relied on in the indictment here, it should be held to be the specific statute dealing with that method and so controlling over any others.

2. On the other phase of the case, namely, the impropriety and unconstitutionality of permitting a prosecutor at his unlimited discretion to decide which person is to be prosecuted for a misdemeanor and which for a felony, we believe what Mr. Justice Lurton said many years ago in *United States* v. *Stever*, 222 U. S. 167, at 173-174, to be applicable here:

> "If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a

> scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment under one not possible under the other."

More recently the subject has received attention by the Supreme Courts of Oregon and Washington. Both have held unconstitutional laws which expressly attempted to give a prosecutor such discretion. *State* v. *Pirkey*, 203 Or. 697, 281 P. 2d 698; *State* v. *Cory*, 204 Or. 235, 282 P. 2d 1054; *Olsen* v. *Delmore*, — Wash. 2d —, 295 P. 2d 324. Clearly no federal prosecutor should be given that great power where Congress has not expressly indicated that it wanted him to have it and the result has, so to speak, come about through inadvertence.

In the first of these state cases the court said (203 Or. at 706-707, 281 P. 2d at 702-703):

> "* * * It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence for the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a prima facie case made against one still presumed to be innocent. * * * We see in this statute no pro-

vision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

Directly in point is what Mr. Justice Black said (with the concurrence of Mr. Justice Douglas) in *Berra* (351 U. S. at 138, 140):

"* * * I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly.

"So far as I know, this Court has never approved the argument the Government makes here. It certainly did not do so in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, upon which the Government seems to rely. * * *

* * *

"The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

CONCLUSION

We submit, therefore, that the writ should issue.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX

(Opinion of United States District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNITED STATES

against

FRANK COSTELLO

—o—

McGOHEY, *D. J.*

The defendant has timely moved pursuant to Section 2255 of Title 28 U. S. C. A. and Rule 35 of the Federal Rules of Criminal Procedure for an order "vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totalling $20,000."

The defendant was tried on an indictment containing four counts which respectively charged that in each of the years 1946 through 1949 he wilfully attempted to evade payment of income taxes due the United States by "filing a false and fraudulent income tax return" in violation of Sec. 145(b) of the Internal Revenue Code of 1939. The jury, on May 13, 1954, returned verdicts of not guilty on the first count, and guilty on the second, third and fourth counts. The defendant was sentenced on each of the latter counts to a term of five years and a fine of $10,000, plus costs of prosecution, the prison terms to run concurrently. The Court of Appeals reversed as to the second count and

affirmed as to the third and fourth counts.[1] The Supreme Court, reviewing only the legal sufficiency of the evidence before the Grand Jury, affirmed.[2]

This motion presents the question, not heretofore raised by the defendant, whether, in view of Sec. 3616(a) of the Internal Revenue Code of 1939, the Court could legally impose five-year terms and $10,000 fines.

Section 145(b) provides:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616(a) provides that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The defendant does not contend that the latter section repealed the former. His contention is that since both sections cover precisely the same ground, "the specific offense of filing a false return with intent to evade taxes, under Sec. 3616(a) prevails over the general denunciation

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[1] 221 F. 2d 668.

[2] 350 U. S. 359.

of attempting to evade taxes denounced by Sec. 145(b)" and therefore a sentence greater than one year and $1,000 fine on each count is illegal.

The motion is denied on the authority of United States v. Moran [3] in which the Court of Appeals for this Circuit rejected a similar contention.

Settle order.

Dated: New York, N. Y.,
August 21, 1956.

JOHN F. X. MCGOHEY,
U. S. D. J.

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[3] 2 C. — F. 2d —; decided Aug. 15, 1956.

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

—o—

Before:

SWAN, MEDINA and WATERMAN,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

HAYS, ST. JOHN, ABRAMSON, HEILBRON, DELANEY & DONOGHUE, *Attorneys for Appellant;* Osmond K. Fraenkel, Morris Shilensky, Joseph Leary Delaney and Jacob Kossman, of Counsel.

PAUL W. WILLIAMS, United States Attorney, *for Appellee;* Arthur H. Christy, Robert Kirtland and William K. Zinke, Assistant United States Attorneys, of Counsel.

PER CURIAM:

Appeal from denial of a motion to correct a sentence imposed under 26 U. S. C. A. § 145(b). On the authority of *United States* v. *Moran,* 2 Cir., 236 F. 2d 361, certiorari denied November 13, 1956, the order is affirmed.

(Order of Affirmance)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of December, 1956.

Present:

HON. THOMAS W. SWAN,
" HAROLD R. MEDINA,
" STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

FRANK COSTELLO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

AND WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.